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Constraining Modern Mercenarism

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Notes

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INTRODUCTION

The private military assistance corporation presents a conundrum for international law, with both concrete and theoretical dimensions. On a concrete level, the private military corporation appears at first glance to be merely a full-service business presenting no threat to international security. One need only look closely at the services advertised, however, to see that the security and military assistance such corporations offer fulfill a function analogous to that of the traditional mercenary, whose activities the international community has long endeavored to constrain. Redefined as "security contractors" and sanitized by their connection to the corporate world, these modern mercenaries are able to evade both the sanction of public disapproval and the definition of mercenarism under international law. By effectively permitting de facto mercenaries to masquerade as security contractors, this transformation also eviscerates the accountability of governments for the actions of mercenaries in their employment by hiding them behind a corporate veil.

In fact, mercenarism is strongly disfavored under international law. The United Nations has concluded that mercenarism destabilizes sovereign nations and impedes the right of peoples to self-determination, and a consensus in favor of eradicating mercenarism has been manifest in positive and customary international legal developments since 1945. These efforts culminated in the Convention Against Mercenaries, which entered into force in 2001, and in the establishment in 2002 of the International Criminal Court, under the jurisdiction of which traditional mercenaries may be tried for war crimes, genocide, or crimes against humanity, indicating that, after millennia of unconstrained mercenarism, international legal mechanisms were finally taking shape to confront this problem decisively.

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Mercenarism's metamorphosis during the final decades of the twentieth century, however, has so far enabled modern mercenaries to evade the reach of a burgeoning international movement toward their eradication. Efforts to modify international legal definitions to recognize private military corporations as mercenary companies have been hindered, thereby causing the letter of the law to diverge from its spirit. Paradoxically, what was traditionally outside the law now seems to fall within it as a result of a loophole created by repackaging and re-labeling the prohibited activity while the legal definition of mercenarism was held static. As matters now stand, these private contractors effectively circumvent all international constraints, notwithstanding the fact that the use of mercenaries in any form remains a clear violation of the spirit of international law.

The most obvious solution to this conundrum appears to be modernization of international legal definitions of mercenarism to restore consistency between the letter of the law and its spirit. This could be accomplished by changing the traditional definition from a narrow, actor-oriented conception to one focused on prohibited activities, whether undertaken by individuals or groups, "soldiers of fortune" or "contractors." Such an expansion of the international definition to encompass mercenarism in its modern manifestation would not only bring modern mercenaries back under the law, but would also be instrumental in holding government actors employing mercenaries through private military corporations accountable for the criminal actions of the mercenaries they hire.

On a theoretical level, however, the problem posed by the modern mercenary appears to be nothing more than a symptom of a broader underlying disorder stemming from policy decisions motivated by an intuition that a powerful state is free to disregard international law to whatever extent it can get away with. The concomitant exploitation by powerful states of the ambiguities in international legal definitions is further illustrated by the recent American flouting of the spirit, if not the letter, of the Geneva Conventions at Abu Ghraib and Guantánamo Bay. From this perspective, employment of the modern mercenary can be understood as merely one facet of a larger philosophical problem posed by the United States' apparent combination of both the power and the will to ignore international law in multifold circumstances.

The extraordinary departure from enduring principles of international governance represented by the actions of private military corporations on behalf of the United States in Iraq is further revealed by an examination of the theoretical underpinnings of the system of international legal obligation. The traditional justifications for the binding char-

acter of the consensus of the international community are no less applicable to the unauthorized use of modern mercenaries, which itself is but a single, albeit highly consequential, example of a solitary rogue state wielding force to impose its own mandate in contravention of the legitimate consensus arrived at by the majority of international actors. There are philosophical grounds, however, for recognizing an obligation to obey international law, even where it does not carry an enforceable sanction. Even powerful states have an obligation to comply with international law and, in the context examined herein, to refrain from employing mercenaries without regard to the enforceability of the international constraints on their use. Ideally, the international definition of mercenarism should be amended to bring the letter of the law into congruence with its spirit; however, even without such a change, the dictates of the spirit of international law should nevertheless be recognized as binding.

Part I of this Note traces the history of international efforts to constrain mercenarism. Focusing on the United States as an example, Part II recounts the change in the form of mercenarism brought about by the rise of the private military corporation and the concurrent shift in attitude, and then goes on to survey the extent to which the resultant modern mercenary is currently engaged in the United States' conduct of the conflict in Iraq. Part III examines the evolution of international definitions of mercenarism, first considering how they came to focus solely on individual actors to the exclusion of corporate entities and what potential consequences may result from this divergence of the letter of the law from its spirit, and then assesses the prospects for modernizing the current definition to restore the connection between letter and spirit and attributing liability to state actors for the action of private military corporations in their employment. Part IV takes a philosophical turn, situating the paradox of the modern mercenary in the broader context of compliance with international laws and norms. Starting from the question whether states have an obligation to comply with the spirit of international law, Part IV looks to jurisprudential theory for guidance, ultimately concluding that even powerful states are legally and morally obligated to comply with international law, regardless of the existence of enforceable sanctions, which suggests that whether the legal definition of mercenarism is modernized or not, the international consensus against mercenarism constitutes a binding obligation to comply with its spirit.

I. TRADITIONAL MERCENARISM UNDER INTERNATIONAL LAW

A. HISTORICAL BACKGROUND

Mercenarism has long been a element of warfare. As one commentator has observed, "[t]he sovereign's resort to mercenaries is as old as history itself."[1] Likewise, the primary threat posed by mercenarism was documented as long ago as Thucydides's history of the Peloponnesian War.[2] In the summer of 413 B.C., the Athenians dispatched 1300 mercenary swordsmen along the Euripus Strait to stage a surprise attack wherever it might prove advantageous. Landing at Mycalessus, these Thracian mercenaries scaled the city's walls and laid siege:

> The Thracians bursting into Mycalessus sacked the houses and temples, and butchered the inhabitants, sparing neither youth nor age but killing all they fell in with, one after the other, children and women, and even beasts of burden, and whatever other living creatures they saw .... Everywhere confusion reigned and death in all its shapes; in particular they attacked a boys' school, the largest that there was in the place, into which the children had just gone, and massacred them all.[3]

This episode recounted with revulsion by Thucydides demonstrates the powerlessness of civilization to constrain the means chosen by mercenaries to achieve their instrumental ends. Although Thucydides intended his account "as a possession for all time" offering "an exact knowledge of the past as an aid to the understanding of the future, which must resemble if it does not reflect it,"[4] the frequency of similar episodes since his time calls into doubt how much has been learned from past experiences with mercenarism.

In one sense, then, the problem raised by this Note can be viewed as merely a reiteration of an old debate, as "500 years after the demarcation between mercenary and standing armies, 700 years after the formation of the free companies, and 2300 years after Alexander employed mercenary Cretan archers, the international community again wrestles with the question of how to regulate mercenaries."[5]

Nevertheless, the terms of that debate have changed dramatically in the last hundred years as systematic efforts were introduced first to regulate the conduct of mercenaries and later to put explicit limitations on their employment by states. Mercenaries "were tacitly accepted before

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1. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 2 (2003).

2. *See, e.g.*, THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 442–45, 455–56 (Robert B. Strassler ed., Richard Crawley trans., 1996).

3. *Id.* at 444.

4. *Id.* at 16.

5. Milliard, *supra* note 1, at 10–11.

the twentieth century, . . . if not by polite society, then by most states, their armies, and international law."[6] During the twentieth century, however, the international community evinced an emerging consensus against their use. In the second half of the century, efforts at international control of mercenarism were undertaken in response to post-colonial developments. In this context, "the first attempts at mercenary regulation focused on eliminating but one type of mercenary, the indiscriminate hired gun who ran roughshod over African self-determination movements in the post-colonial period from 1960 to 1980. As mercenaries evolved, however, mercenary regulations did not."[7] The international scheme for regulation of mercenaries thus failed to keep pace with the emerging category of private corporate soldier. As the U.N. Special Rapporteur on mercenarism acknowledged as early as the 1980s, international laws addressing mercenaries have not "caught-up with the changes brought about by this new kind of security company."[8]

The spirit of international law nevertheless remains clearly opposed to the use of soldiers of fortune. The strong international consensus that the use of mercenaries in armed conflict should be prohibited has been unequivocally manifest in the development of positive law under U.N. auspices for two decades. In fact, the international community has been working to place significant legal limitations on the use of mercenaries since 1970, when the United Nations passed a declaration imposing on states the duty to prevent the organization of armed groups for dispatch to other states.[9]

In 1984, the General Assembly took an additional step in this direction by adopting Resolution 39/84, entitled "Drafting of an international convention against the recruitment, use, financing and training of mercenaries."[10] This resolution charged an existing ad hoc committee of representatives from thirty-four member states with the task of completing a draft convention. Resolution 39/84 articulated the motivations for this undertaking as follows:

> *Bearing in mind* the need for strict observance of the principles of sovereign equality, political independence, territorial integrity of States and self-determination of peoples, enshrined in the Charter of the United Nations . . . ,

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6. *Id.* at 7 (footnote omitted).

7. *Id.* at 3 (footnote omitted).

8. Kevin A. O'Brien, *The New Warrior Class*, *in* WARLORDS IN INTERNATIONAL RELATIONS 52, 76 (Paul B. Rich ed., 1999).

9. *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 124, U.N. Doc. A/8028 (1970).

10. G.A. Res. 39/84, U.N. GAOR, 39th Sess., 99th mtg., U.N. Doc. A/RES/39/84 (1984).

> ....
>
> *Recognizing* that the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against colonialism, racism and *apartheid* and all forms of foreign domination,
>
> *Bearing in mind* the pernicious impact that the activities of mercenaries have on international peace and security,
>
> *Considering* that the progressive development and codification of the rules of international law on mercenaries would contribute immensely to the implementation of the purposes and principles of the Charter ....[11]

In other words, the mandate for the committee was inspired by the U.N. Charter itself, as well as the recognition both that "the activities of mercenaries are contrary to fundamental principles of international law" and that codified rules governing mercenaries would be of crucial importance to realizing the objectives of the United Nations.

Five years later, in 1989, the ad hoc committee produced a final draft of the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (the "Convention Against Mercenaries"), which defined all enumerated activities in connection with mercenarism as offenses, prohibited states parties from recruiting, using, financing, or training mercenaries, demanded their participation by appropriate measures, and required that they make offenses against the Convention punishable by penalties taking into account the grave nature of those offenses.[12] In October 2001, having been ratified by twenty-two states, the Convention Against Mercenaries entered into force. To date, thirty-four states have signed the Convention and twenty-five states have ratified it.[13]

II. DEVELOPMENT OF THE MODERN MERCENARY

A. THE MERCENARY SANITIZED

Despite the fact that the Convention Against Mercenaries addresses a problem the United Nations identified as a significant hindrance to the

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11. *Id.*

12. G.A. Res. 44/34, U.N. GAOR, 44th Sess., 72d plen. mtg., U.N. Doc. A/RES/44/34 (1989) [hereinafter Convention Against Mercenaries].

13. The United States is not among them. *See* Enrique Bernales Ballesteros, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Commission on Human Rights, 60th Sess., ¶ 49, U.N. Doc. E/CN.4/2004/15 (2003) [hereinafter December 2003 Report].

implementation of the purposes and principles of its Charter, twenty years after the adoption of Resolution 39/84 the use of mercenaries has burgeoned rather than diminished. This situation is due in part to recent transformations in the image and form of mercenarism, which today presents itself in a new light—as the business of publicly traded private military assistance companies. Instead of continuing to operate in a relatively clandestine manner, the modern mercenary industry is now conducting business in broad daylight, out of respectable corporate offices and under the euphemistic name of "private security," thereby presenting an ever greater challenge to international legal controls.

The modern mercenary is a private contractor employed by a corporation that may offer an array of services seemingly having little to do with actual armed combat. The corporations employing these modern mercenaries operate behind a variety of façades and on an increasingly large scale. In that sense, "[p]rivate military companies take on many labels today, including, among others, mercenary firms, private armies, privatized armies, private military corporations, private security companies or firms, private military contractors, military service providers, nonlethal service providers, and corporate security firms."[14]

Mercenary services are now being offered by major corporations, either directly or through their subsidiaries. One leading private military corporation, ArmorGroup, "was listed as one of *Fortune*'s 100 fastest growing companies in 1999 and 2000."[15] Another large military firm, Military Professional Resources Incorporated, "was purchased in 2000 by L-3 Communications, an entity spun off from military manufacturers Loral and Lockheed Martin."[16] Lockheed Martin has also expressed interest in acquiring Titan Corporation, which provides security and intelligence personnel to the Coalition Provisional Authority in Iraq.[17] As the U.N. Special Rapporteur on mercenarism recently described them,

> [t]hese companies are modern, multipurpose, transnational companies, which do not hesitate to recruit mercenaries for certain of the activities they offer. They tend to be highly efficient in matters of military science, but they also tend to have few scruples about recruiting mercenaries for difficult, highly dangerous missions in zones and territories where violence and armed conflicts are taking place.[18]

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14. Milliard, *supra* note 1, at 2.

15. Harry Magdoff et al., *Notes from the Editors*, MONTHLY REV., May 2004, *available at* http://www.monthlyreview.org/nfte0504.htm.

16. *Id.*

17. Katie Fairbank, *Who Investigates Private Interrogators? Use of Contractors to Gather Intelligence Raises Concerns*, DALLAS MORNING NEWS, May 7, 2004, at 22A.

18. Enrique Bernales Ballesteros, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N.

Although the definition of "mercenary" under international law has not kept pace with the evolution of the private military corporation, as suggested above, this change in form and the resulting evasion of regulation are clearly inconsistent with the spirit of international law.

B. THE AMERICAN EXPERIENCE

1. *Roots of the American Private Military Corporation*

The shifting form and image of the modern mercenary mirrored an ambivalence in American culture with respect to the issue of mercenarism: On the one hand, the employment of soldiers of fortune is widely and consistently condemned. On the other hand, mercenaries operating under the guise of private military corporations have been openly embraced, and the United States has played a role in preventing international definitions from conflating these two artificially distinguished categories.

The first of these views is manifest in what Anthony Mockler described as an "overwhelmingly strong" American prejudice against the use of mercenary soldiers—presumably dating from the British employment of Hessian mercenaries against the Colonists in the Revolutionary War.[19] As a result, Mockler observed in 1985 that "the United States is almost the only imperial power in history that has never employed mercenary troops directly (and only with reluctance and secrecy indirectly)."[20] U.S. Senate hearings held the same year on the subject of mercenary training camps in the United States evinced a similar consensus that mercenaries were a largely undesirable phenomenon. In fact, Senator Jeremiah Denton opened the hearings by describing private mercenary camps as "a growing national phenomenon which may impact our foreign policy, our relations with other national states, the safety of the public, and the image of the United States abroad."[21]

Although the explicit concept of "mercenary" was considered almost taboo, however, the Senate hearings also demonstrated the ambivalence mentioned above toward one particular iteration of mercenary training: "commercial establishments" referred to as "security consultants" operating mercenary training camps set up "to afford highly specialized in-

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Commission on Human Rights, 58th Sess., Supp. No. 118, ¶ 27, U.N. Doc. A/58/115 (2003) [hereinafter July 2003 Report]. Moreover, these corporations "now operate on the five continents." December 2003 Report, *supra* note 13, ¶ 29.

19. ANTHONY MOCKLER, THE NEW MERCENARIES 5 (1985).

20. *Id.*

21. *Hearing Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary on U.S.-Based Private Counterterrorism/Mercenary Training Camps*, 98th Cong. 1 (1985) (opening statement of Hon. Jeremiah Denton).

struction to law enforcement, corporate security, and military organizations throughout the world."[22] The written testimony of an FBI witness described these security consultant training camps as "very similar to the paramilitary and survivalist training camps and encompass[ing] all the types of training offered by them in addition to providing information to their graduates regarding foreign employment in security and mercenary positions abroad."[23] Yet the FBI had determined that these commercial security consultant schools were not violating federal law "by recruiting mercenaries" because the Mercenary Association, which operated the schools, gave all attendees a document specifying as follows:

> This is to explain the position of the Association on employment of its membership. There are legal restrictions as to what type of employment we can offer.... To remain legal, we must restrict our assistance to the membership to the supplying of information on foreign employment, and leaving action to the individual.[24]

Senator Denton specifically excluded this category of mercenary from consideration on the ground that "the law enforcement or security firm-connected [camps] are certainly relatively harmless; in fact helpful."[25] In other words, by offering the same type of mercenary training but referring to their graduates as "security consultants" and declining to offer them direct employment, these commercial camps apparently posed no threat either to the United States' international relations or reputation, or to the public safety, but in fact were deemed to serve a helpful role.

The sanitization of corporate mercenaries, already foreshadowed at these 1985 Senate hearings, has progressed dramatically during the past two decades, and the industry has grown accordingly. At least part of the explanation appears to lie in the fact that the United States, like other Western democratic states, has been increasingly reluctant to engage directly in conflict because of the fear of the political consequences of military casualties.[26] As a result, following the end of the Cold War and a consequent drop in the volume of international governmental peacekeeping activities, many individuals with military experience and expertise became available to the private sector.[27] As one commentator has observed, mercenary corporations constitute "a new means of disguised efforts by their home states to influence conflicts in which the home

22. *Id.* at 26 (statement of FBI witness Wayne R. Gilbert).
23. *Id.* at 35 (prepared statement of Wayne R. Gilbert).
24. *Id.* at 36 (prepared statement of Wayne R. Gilbert).
25. *Id.* at 26–27 (statement of Hon. Jeremiah Denton).
26. *See* David Shearer, *Outsourcing War*, FOREIGN POL'Y 68, 70 (1998).
27. *See* Milliard, *supra* note 1, at 12.

states are technically neutral."[28] In keeping with this image of neutrality, the reputations of the private companies that supply mercenaries underwent dramatic changes during the last decade: "[N]ew forms of military contractors have emerged, able to provide soldiers for training or for the application of force, openly advertising their availability, resembling transnational corporations more than shadow criminal movements, sensitive to public relations, and loathe to being described as mercenaries."[29]

The resultant private security contractor is a relative newcomer to the mercenary landscape. As Kevin O'Brien has described the "new warrior" embodied in the modern mercenary: "Where, ten years ago, such a category was composed of individuals tasked with personal and installation protection primarily, private security companies have grown to such a degree that many of them now include capabilities in transport, intelligence, combat-firepower, and para-medical skills."[30] He points out that the emergence of these private companies has raised unprecedented policy issues:

> Given that war-fighting and security have traditionally been the domain of the state, the transference of these capabilities to private corporations has launched debate surrounding . . . what steps should and can be taken to regulate such bodies, making them accountable to either national governments or a world body such as the UN. . . . The privatization of these activities cannot be controlled in the [traditional] manner, given that enterprises which enter into commercial agreements with other governments have not, traditionally, fallen under the rubric of military oversight or arms control.[31]

In the last decade, as privatization of military operations has accelerated, the market for private security contractors has expanded.[32] In this climate, private military contractors have themselves been ever more explicit about the role they have begun to play with increasing frequency. Former industry leader Executive Outcomes advertised its services with a brochure offering "Clandestine Warfare, Combat Air Patrol, Armored Warfare, Basic and Advanced Battle Handling, and Sniper Training."[33] Before its dissolution in 1997, Executive Outcomes publicly assessed the expansion of the role of these corporations as follows:

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28. Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 82 (1998).

29. MICHAEL V. BHATIA, WAR AND INTERVENTION: ISSUES FOR CONTEMPORARY PEACE OPERATIONS 51 (2003).

30. O'Brien, *supra* note 8, at 57.

31. *Id.* at 58.

32. BHATIA, *supra* note 29, at 51–52.

33. Elizabeth Rubin, *An Army of One's Own: In Africa, Nations Hire a Corporation to Wage War*, HARPER'S, Feb. 1997, at 47.

> A world wide tendency is currently the privatization of security/ policing services. This is mainly due to the scaling down of Military/ Peacekeeping budgets by not only the major powers but also by countries across the globe. It is therefore foreseen that future peacekeeping/ refugee protection operations will be conducted more and more by companies such as [Executive Outcomes, which] sees itself as a major role player in these developments due to its previous experience and track record in such type of operations.[34]

2. *Outsourcing in Iraq*

The issue of the privatized military has recently come to the fore as a result of the United States' invasion of Iraq in March 2003. For instance, the United States currently employs roughly 20,000 private military contractors in Iraq—both U.S. citizens and foreigners—an unknown number of whom are serving as "security" personnel and providing military and interrogation support to U.S. and Coalition forces.[35] Utilizing a private army of this size, the United States is at the forefront of military outsourcing, with private military contractors accounting for the second largest force in Iraq.

The ubiquity of such firms in the single example of Iraq is surprising:

> Vinnell Corporation, a subsidiary of Northrop Grumman, the second largest defense contractor in the United States, . . . has been given the contract to train the New Iraqi Army. Custer Battles with 1,300 employees in Iraq has a contract to guard the Baghdad airport. Dyncorp is receiving tens of millions of dollars to train the Iraqi police force.[36]

ArmorGroup has 800 security contractors working in Iraq.[37] Erinys International employs some 14,000 contractors to provide security to Iraq's oil production facilities.[38] Blackwater USA's "Global Elite Troops," who have engaged in combat in Najaf,[39] are serving as bodyguards to Coalition Provisional Authority administrator L. Paul Bremer III and training

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34. O'Brien, *supra* note 8, at 76.

35. David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A14.

36. Magdoff, *supra* note 15.

37. *Id.*

38. Robert Fisk & Severin Carrell, *Occupiers Spend Millions on Private Army of Security Men*, INDEP. (U.K.), Mar. 28, 2004, at 21. After the killing in January of four subcontractors hired by Erinys, "they were revealed to be former members of apartheid-era security forces in South Africa. One had admitted to crimes in an amnesty application to the Truth and Reconciliation Commission there." Barstow, *supra* note 35.

39. Barstow, *supra* note 35. After the Najaf battle, a spokesperson for Blackwater admitted that the line between security and combat operations "is getting blurred." *Id.* Some companies are employing novel strategies to maintain synthetic distinctions. Custer Battles, yet another private military corporation, has hired Paul Christopher, a West Point philosopher and author of *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (3d ed. 2004), a standard text in military ethics, to help "the company define its place and policies in the chaos of Iraq." *Id.*

Chilean commandos—veterans of the Pinochet regime—to serve alongside U.S. soldiers.[40] Another U.S. private military corporation has contracted with former Polish special forces soldiers to provide "reaction to threats and liquidation of attackers" in occupied Iraq.[41] Aegis Defence Services, led by Tim Spicer, former director of Sandline International, a British mercenary firm involved in destabilization efforts in Papua New Guinea and Sierra Leone, "has won a $425 million cost-plus contract to co-ordinate private security for reconstruction projects in Iraq."[42] Even more troubling, contractors from CACI International and Titan Corporation have been linked to the abusive interrogation of Iraqi detainees at Abu Ghraib prison near Baghdad.[43]

In other words, private military contractors are central to U.S. involvement in Iraq, as is further demonstrated by the government's commitment to their financing, protection, and implicit recognition. According to political scientist Deborah Avant, approximately thirty cents of every dollar spent by the U.S. military in Iraq winds up in the coffers of the more than one hundred private military corporations supporting U.S. troops there, and with recently intensified fighting this percentage is probably increasing.[44] The U.S. government has even solicited bids for a $100 million security contract in Baghdad, stating that "[t]he current and projected threat and recent history of attacks directed against coalition forces, and thinly stretched military force, requires a commercial security force that is dedicated to provide Force Protection security."[45] Moreover, the governmental sanction extends far beyond the monetary realm. The U.S. military has deployed its forces to rescue military contractors in trouble. Some contractors are even being accorded

40. *Id.* According to *The Guardian*, "[l]ast month [February 2004] Blackwater USA flew a first group of about 60 former commandos, many of who[m] had trained under the military government of Augusto Pinochet, from Santiago to a 2,400-acre (970-hectare) training camp in North Carolina. From there they will be taken to Iraq." A spokesperson for Blackwater stated that "[w]e scour the ends of the earth to find professionals—the Chilean commandos are very, very professional." Jonathan Franklin, *US Contractor Recruits Guards for Iraq in Chile: Forces Say Experienced Soldiers Are Quitting for Private Companies Which Pay More for Similar Work*, GUARDIAN (U.K.), Mar. 5, 2004, at 14, *available at* http://www.guardian.co.uk/chile/story/0,13755,1162441,00.html.

41. *US-Firma engagiert polnische Ex-Elitesoldaten. Sollen »auf Bedrohungen reagieren und Angreifer liquidieren«*, DER STANDARD (Austria), June 2, 2004, *available at* http://derstandard.at/?url=/?id=1680719. The translation is the Author's.

42. Rowan Callick, *Mercenary Wins Huge Iraq Deal*, AUSTRALIAN FIN. REV., June 23, 2004, at 15.

43. Seymour M. Hersch, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, http://newyorker.com/fact/content/?040510fa_fact.

44. Christopher Byron, *Their Private War; 30% of Iraq War $$ Goes to U.S. Contractors*, N.Y. POST, May 12, 2004, at 39 (interviewing Deborah Avant, professor of political science at George Washington University).

45. Barstow, *supra* note 35.

full military honors when they are killed, even though they are not recognized as members of the U.S. military for any other purpose.[46]

Paradigmatic of the new breed of private military corporation is North Carolina-based Blackwater Security Consulting, currently under contract with the Coalition Provisional Authority in Iraq. In addition to offering tactical and weapons training to military and paramilitary personnel worldwide, Blackwater provides "Mobile Security Teams . . . comprised of former operators primarily from the ranks of the US special operations and intelligence communities," which "stand ready to deploy around the world with little notice in support of US national security objectives, private or foreign interests."[47] In April 2004, after four members of one of Blackwater's teams were killed by resistance fighters in Fallujah, it was reported that

> [w]ith every week of insurgency in a war zone with no front, these companies are becoming more deeply enmeshed in combat, in some cases all but obliterating distinctions between professional troops and private commandos. Company executives see a clear boundary between their defensive roles as protectors and the offensive operations of the military. But more and more, they give the appearance of private, for-profit militias . . . .[48]

In an April 8, 2004, letter to U.S. Defense Secretary Donald Rumsfeld, Senator Jack Reed echoed some of the concerns raised in the 1985 Senate hearings. Senator Reed protested that private military corporations under contract in Iraq "operate in a fashion that is hard to distinguish from military forces," and that they are "not under military control and are not subject to the rules that guide the conduct of American military personnel," warning that "[i]t would be a dangerous precedent if the United States allowed the presence of private armies operating outside the control of governmental authority and beholden only to those who pay them."[49] Yet the response of the Coalition Provisional Authority has not been to investigate and, if necessary, to prosecute these corporate

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46. *See, e.g.*, Guy Kovner & Cecilia Vega, *Ex-County Resident Dies in Iraq Ambush; Memorial Today for Former Army Ranger Who Was Working as Civilian Contractor on Security Detail*, PRESS DEMOCRAT (Santa Rosa, Calif.), May 4, 2004, at A1; Deborah Schoch et al., *Death Came Brutally to a Man Who "Never Quit"*, L.A. TIMES, Apr. 3, 2004, at 1; Thomas J. Sheeran, *Two Security Contractors Killed in Iraq Are Buried*, FORT WORTH STAR-TELEGRAM, Apr. 11, 2004, at 22; Ronald D. White, *For Titan, Deaths Hit Close to Home*, L.A. TIMES, Apr. 19, 2004, at C1.

47. Blackwater Security Consulting, http://www.blackwatersecurity.com/services.html (last visited June 6, 2004). In case things get particularly ugly, Blackwater also offers "full protective detail for any threat scenario." *Id.*

48. Barstow, *supra* note 35. *See also* David Barstow, *Security Firms Says Its Workers Were Lured into Iraqi Ambush*, N.Y. TIMES, Apr. 19, 2004, at A1.

49. Letter from Sen. Jack Reed to Hon. Donald H. Rumsfeld, Secretary of Defense (Apr. 8, 2004).

mercenaries but to immunize all private contractors from civil and criminal liability for the duration of the Authority's existence.[50] As these conditions reveal, the questions regarding the definition of mercenarism and the proper steps to constrain it are not idle matters.

III. DIVERGENCE OF THE LETTER AND SPIRIT OF INTERNATIONAL LAW

A. THE MODERN MERCENARY NO LONGER STANDS OUTSIDE THE LAW

The rise of the corporate mercenary has effectively resulted in a divergence between the letter and the spirit of international law. Because existing international definitions of mercenarism focus more on individual actors than on the actions to be prohibited, today's private military contractors can act as virtual mercenaries without being subject to the laws purporting to govern mercenarism. In essence, they have defined themselves out of existence under international law, so that activities recently falling outside the law now paradoxically appear to fall within the scope of legality when engaged in by private military corporations.

The conundrum presented by private military corporations is thus that "the international laws of war that specifically deal with their presence and activity are largely absent or ineffective."[51] This situation exists primarily because "the existing laws do not adequately deal with the full variety of private military actors. That is, they are specifically aimed at only the individuals working against national governments or politically recognized movements of national liberation."[52] Such gaps in the law mean not only that private military corporations themselves are not directly regulated, but also that the organization of mercenary forces behind the corporate veil serves as protection against liability for those who hire them.

As a result, neither of the two primary international mechanisms for constraining mercenary conduct is effective against private military contractors or their corporate or ultimate state employers. As noted above, the Convention Against Mercenaries makes it an explicit offense to employ mercenaries; however, the Convention contemplates mercenaries acting as individual combatants and is therefore unlikely to cover corporate mercenaries because of their employment as private "contractors"

50. Coalition Provisional Authority Order 17, Statute of the CPA, MNF-Iraq, Certain Missions and Personnel in Iraq (Rev.) (June 27, 2004), *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf. The Authority plans to extend this blanket immunity beyond the termination of its rule in Iraq. *See* Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A1.

51. Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 525 (2004).

52. *Id.* at 531.

by firms that provide a full array of services and the resulting uncertainty regarding whether these contractors are engaged in conflict.

The other possible avenue for constraining the actions of private military contractors is the International Criminal Court (the ICC), established to try "natural persons" for war crimes as described in the Geneva Conventions.[53] A traditional mercenary committing a war crime could be subject to the jurisdiction of the ICC.[54] Under the principles embodied in the Rome Statute, superiors of traditional mercenaries might be triable in the ICC for the crimes of the mercenaries under their supervision. This potential international legal mechanism for trying traditional mercenaries and their superiors for war crimes, like the Convention Against Mercenaries, does not appear to extend to the situation of the modern mercenary.[55]

Despite this evidence, the belief that modern mercenaries have escaped jurisdiction through a loophole in international law is not universally held. Officials from the Dutch ministry of defense have posited that the actions of employees of private military corporations in Iraq are governed by both U.S. and Iraqi law, and that, ultimately, "the country that has hired them . . . is responsible at all times for what private contractors do or fail to do."[56] Accordingly, Dutch troops serving in Iraq have been instructed to act with force against private contractors "if they are found in breach of international rules of warfare."[57] Thus, the international consensus against the use of mercenaries in armed conflict remains in effect in at least some quarters without regard to changes in form. Nonetheless, there is widespread agreement that the question is not simple, because "[t]he various loose formulations of exactly who is a mercenary, as well as the absence of any real mechanism for curtailing mercenary activities,

53. *See* Statute of the International Criminal Court, art. 1, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

54. Superiors of persons who committed war crimes have been held liable by the International Criminal Tribunal for Rwanda for their inferiors' actions. *See* Statute of the International Criminal Tribunal for Rwanda, S.C. Res 955, art 6(3), U.N. Doc. S/RES/955 (1994); *see also* Prosecutor v. Jean de Dieu Kamuhanda, ICTR-95-54A-T (2004). The most famous of these decisions, the so-called "Media Cases," are discussed in Catherine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 98 AM. J. INT'L L. 325, 327 (2004).

55. The Author asked Judge Philippe Kirsch whether the ICC's jurisdiction could extend to corporate entities engaging in mercenarism. He replied that the question was yet to be decided. Conversation with Judge Philippe Kirsch, President of the International Criminal Court, World Affairs Council, San Francisco, Calif. (Jan. 12, 2004).

56. Hans de Vreij, Privatising the Iraq War, Radio Netherlands Wereldomroep (May 14, 2004), http://www.rnw.nl/hotspots/html/irq040514.html.

57. *Id.*

creates difficulties for anyone attempting to curtail [private military] activity by use of international law."[58]

B. Modern Mercenarism Does Not Comport with Traditional Definitions

Traditional definitions of mercenarism were not designed to encompass the private military corporations in which mercenary bands are embodied today. In fact, the discontinuity between the international definition and today's actuality has a lengthy history. Even prior to the most recent developments in modern mercenarism, arriving at an internationally accepted definition of mercenaries seems to have been an insurmountable problem. As one commentator observed in 1992, "[p]roblems with the meaning of the word 'mercenary' have plagued popular and technical discussions over the centuries and are reflected in much contemporary debate, especially about legal measures to be taken against mercenaries."[59] In fact, Assistant Secretary of State William Schaufele testified before Congress in 1976 that "[a] legally accepted definition of what constitutes a mercenary does not exist in international law."[60] Even as international law did develop specific definitions, it remained the case that, as the U.N. Special Rapporteur on mercenarism explained,

> [the] international legal instruments that serve as a framework for the consideration of the question are imperfect and contain gaps, inaccuracies, technical defects and obsolete terms that allow overly broad interpretations to be made. Thus, for example, a person who is to all intents and purposes a mercenary agent could take advantage of some of the imprecise legal situations to avoid being classified as such.[61]

International legal definitions recognize neither the corporate structure nor the new names by which mercenaries are designated private security contractors. As a result, "the privatized military industry lies outside the full domain of all of these existing legal regimes."[62] This defi-

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58. Singer, *supra* note 51, at 532.

59. C.A.J. Coady, *Mercenary Morality*, *in* International Law and Armed Conflict 55 (A.G.D. Bradney ed., 1992).

60. Edward K. Kwakwa, The International Law of Armed Conflict: Personal and Material Fields of Application 117 (1992) (quoting testimony before House International Relations Committee reprinted in Digest of U.S. Practice in Int'l Law 714–15 (E. McDowell ed., 1976)).

61. Enrique Bernales Ballesteros, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Commission on Human Rights, 54th Sess., ¶ 60, U.N. Doc. E/CN.4/1998/31 (1998). More concretely, the Convention "contains a number of loopholes regarding the requirements relating to nationality, residence, [and] changes in nationality to conceal identity as a mercenary," which would permit citizens of state members of the Coalition who work for private military corporations in Iraq to escape jurisdiction. December 2003 Report, *supra* note 18, ¶ 540.

62. Singer, *supra* note 51, at 532.

nitional lacuna is longstanding and widespread, and gradually becoming more and more significant as the traditional visage of the mercenary is hidden by a sanitized corporate mask. As a result, "the status of [private military corporations] under international law is ambiguous in that there are no regimes that exactly define or regulate them. The current legal definitions designed for individual mercenaries are neither fully applicable to [private military corporations] nor effective in and of themselves."[63] Similarly, because modern mercenaries constitute a new entity not incorporated into any standard international legal definitions of the term "mercenary," none of which contemplates the organization of mercenaries into corporations; their actions are not attributable under international law to the state actors who hire them.

1. *Evolving Definition Under the Convention Against Mercenaries*

Mercenaries were first explicitly defined under international law by the 1977 Additional Protocols to the Geneva Conventions (the "Additional Protocols"), which provided the following definition of "mercenary," focusing exclusively on individuals:

> 2. A mercenary is any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in the hostilities;
>
> (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) is not a member of the armed forces of a Party to the conflict; and
>
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[64]

After years of drafting, the United Nations in 1989 adopted the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (the "Convention Against Mercenaries"), which took effect in 2001.[65] The Convention Against Mercenaries, which makes

63. *Id.* at 534.

64. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (June 8, 1977).

65. Convention Against Mercenaries, *supra* note 12.

it an offense to recruit, use, finance or train mercenaries, incorporates a definition of mercenarism virtually identical to that of the Additional Protocols, and also adds the following, in both cases concentrating exclusively on individual actors:

> 2. A mercenary is also any person who, in any other situation:
>
> (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
>
> (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
>
> (ii) Undermining the territorial integrity of a State;
>
> (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
>
> (c) Is neither a national nor a resident of the State against which such an act is directed;
>
> (d) Has not been sent by a State on official duty; and
>
> (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.[66]

Therefore, both of these international definitions exclude the possibility of mercenarism taking the kind of corporate form in which is manifest today. This failure to capture the potential relationship between states and intervening corporations that supply mercenaries was not merely the result of lack of foresight on the part of the drafters. In fact, the definition of the term "mercenary" was vigorously disputed among the drafters of the Convention Against Mercenaries, as was also the case with the drafting of the Additional Protocols. The bias in favor of characterizing mercenaries in individual rather than corporate terms is manifest particularly clearly in the Convention's drafting process, which illustrates the source of the difficulty in holding states accountable for war crimes committed by third-party mercenaries working on their behalf. An early proposed draft specifically provided that the prohibitions on numerous actions having to do with mercenarism—including, inter alia, enlisting, training, or promoting mercenaries—would be applicable to groups or associations.[67] Yet this specification of "groups" was almost immediately replaced by the more limited word "person," thereby excluding corporations from liability under the Convention for engagement in such activi-

66. *Id.*

67. *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 40th Sess., Supp. No. 43, at 36, U.N. Doc A/40/43 (1985) (draft of Article 3 §§ (a) and (c)).

ties.[68] In 1989, when the final draft was agreed upon, the relevant language had been even further narrowed to confine liability for mercenary activities to "[a]ny person who recruits, uses, finances or trains mercenaries," or any "person" who was the accomplice of a person committing offenses prohibited by the Convention.[69]

The reversion to the use of the word "person" significantly limited the applicability of the Convention Against Mercenaries to today's private military corporations. As Peter Singer of the Brookings Institution has observed, "[u]nfortunately, the [Convention] had extremely poor timing. The document came out just as the private military trade began to transform, from only being made up of individual mercenaries to being dominated by private companies."[70] Thus, "the only real legal sanction available applies not to the firms, but only to their employees, and only in very limited circumstances."[71]

The weaknesses in the definition of "mercenary" under international law have begun to be addressed on an official level. In 2002, the U.N. Commission on Human Rights asked the Special Rapporteur on mercenarism, Enrique Bernales Ballesteros, to take account of the "new forms, manifestations and modalities" of mercenarism.[72] In his July 2003 Report, Ballesteros analyzed the present situation and concluded "that the definition of mercenary contained in article I of the [1989 Convention] is very difficult to apply in practice and that, if mercenary activities are to be prevented, eradicated and punished, the definition must be modified by amending the Convention."[73]

Ballesteros posited that mercenarism was taking on new forms as a result of the absence of adequate international legislation. He observed that "the legal instruments available to define mercenary acts and characterize mercenary conduct are insufficient and in some aspects deficient or have serious gaps."[74] After referring to the emergence of private international security and military consultancy companies that recruited mercenaries for a variety of services and whose operations were facilitated by loopholes in international law, Ballesteros concluded that the

68. *See id.* at 26 (draft Article 3).

69. *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 44th Sess., Supp. No. 43, at 12, U.N. Doc. A/44/43 (1989) (draft of Articles 2 and 4).

70. Singer, *supra* note 51, at 531.

71. *Id.* at 534.

72. *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. Commission on Human Rights, 58th Sess., U.N. Doc E/CN.4/RES/2002/5 (2002).

73. July 2003 Report, *supra* note 18, ¶ 2.

74. *Id.* ¶ 72.

> lack of clear, comprehensive and consistent international legislation prohibiting mercenary activities is one of the chief problems detected in relation to mercenaries. . . . Furthermore, the increasing tendency of mercenaries to hide behind modern private companies providing security and military advice and assistance my be due to the fact that international legislation has not taken account of new forms of mercenary activity.[75]

In other words, authentic mercenaries tend to rely on those imperfections and legal loopholes to avoid being characterized as such.[76] Alluding to Executive Outcomes' past involvement in the securing of diamond mines in Angola, Ballesteros wrote of "put[ting] a stop to the presence of private military security companies, which were recruiting mercenaries and were linked throughout the [1990s] to lucrative business interests."[77] He also noted that a government that hires mercenaries or mercenary corporations "for its own defence and political purposes . . . to bolster positions in armed conflicts does not change the nature of the act or its illegitimacy."[78] The "tasks of security, public order and defence" are constitutionally state functions, and therefore states are "not authorized to recruit and employ mercenaries" to carry them out.[79]

Ballesteros therefore proposed a new definition in his December 2003 Report, which would amend Articles 1–3 of the Convention Against Mercenaries, including a specific reference to organizations:

> 2. A mercenary is also any person who, in any other situation:
>
> . . . .
>
> (b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded . . . .[80]

This proposed amendment goes beyond the definition originating in the 1977 Additional Protocols to "include both the mercenary as individual agent and mercenarism as a concept related to the responsibility of the

75. *Id.* ¶¶ 48–49.

76. *Id.* ¶ 50.

77. *Id.* ¶ 27. This linkage seems readily apparent in present-day Iraq, where private military corporations are providing heavily armed mercenaries presumably to protect the interests of the occupying power and multinational corporations with which it has contracted to administer Iraq's national mineral and water supplies.

78. *Id.* ¶ 54(i).

79. *Id.*

80. December 2003 Report, *supra* note 13, ¶ 47.

State and organizations concerned in the planning and execution of mercenary acts."[81] Ballesteros argued that private military corporations should be regulated and placed under international supervision.[82] "They should be warned, however, that recruiting mercenaries who commit the acts set forth in the International Convention amounts to a violation of international law and will entail prosecution of both the mercenary and the agency that hires and employs him."[83] This expanded definition, if adopted, would mark a decisive first step in constraining modern mercenarism under international law.

Nevertheless, the certainty of the proposed definition's fate has been called into serious questions by recent events. As this Note was going to print, the United Nations announced the appointment of a new Special Rapporteur on mercenarism[84] to replace Enrique Ballesteros, who had served since the creation of the mandate in 1987.[85] The newly appointed rapporteur, Dr. Shaista Shameem, director of the Fiji Human Rights Commission, hails from a country well-known for supplying mercenaries to the world, some of whom are working today as private security contractors in occupied Iraq.[86] It is unclear from preliminary reports whether Shameem will follow Ballesteros's path or chart a narrower course. In an interview soon after her appointment, however, Shameem asserted that Fijians currently employed in Iraq by private military corporations could not be classified as mercenaries under the existing definition.[87] She was also careful to distinguish her task from her predecessor's—which was to "widen the definition of mercenary in the Convention but also within the legal framework"—stating that her "specific mandate doesn't actually apply *unless* those people are used to destabilise the integrity of the state in which they're working."[88] As a final point, Shameem conceded that, "although we'd like to see [mercenary] activity lessened, we know that

81. July 2003 Report, *supra* note 18, ¶ 60.

82. *Id.* ¶ 54(h).

83. *Id.* ¶ 68.

84. *See* Human Rights Commission Chairman Nominates Experts for Fact-finding Mechanisms (July 7, 2004), http://www.un.org/News/Press/docs/2004/hrcn1100.doc.htm.

85. Press Release, United Nations, Shaista Shameem Appointed Special Rapporteur on the Use of Mercenaries (Aug. 2, 2004), http://www.unog.ch/news2/documents/newsen/hr04083e.htm. For an account of the original mandate, see Enrique Bernales Ballesteros, Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination ¶ 84, U.N. Commission on Human Rights, 53d Sess., U.N. Doc. E/CN.4/1997/24 (1997).

86. Fiji Iraq Guards Not Mercenaries: Shameem, Fiji Live (Aug. 5, 2004), http://www.fijilive.com.

87. *Id.*

88. Nic Maclellan, Fiji: Human Rights Activist Appointed as UN Expert, Pacific Beat, ABC Online (Australia) (Aug. 6, 2004), http://www.abc.net.au/ra/pacbeat/stories/s1170422.htm (emphasis added).

the reality is that there's huge money involved in this sort of thing and we're not likely to see it dissipating in the near future."[89]

2. *Defining the Scope of the International Criminal Court*

For essentially the same reasons discussed above, it is also unlikely that the ICC could serve as a means of holding state actors accountable for the actions of private military corporations. Article 25 of the Rome Statute establishing the ICC addresses "Individual criminal responsibility," and section 1 thereof states that the ICC shall have jurisdiction over "natural persons," a term not defined in the Statute.[90] On its face, this suggests that neither organizations nor states responsible for war crimes would come under the jurisdiction of the court. A close reading of the Statute, however, leaves it unclear whether such entities could escape liability for crimes committed by "persons" in their employ. Thus, the possibility cannot be ruled out that the court could, under certain circumstances, exercise jurisdiction over private military corporations or the relevant state actors that hire them. To determine whether "natural persons" could be extended to include corporate or governmental entities, the court would need to proceed down the hierarchy of legal authority as provided in Article 21(1) of the Rome Statute.[91]

The same tensions regarding the content of definitions affected drafting decisions even more transparently in connection with the establishment of the International Criminal Court. As noted above, Article 25 of the Rome Statute states that the ICC shall have jurisdiction over "natural persons" yet does not define this term.[92] In fact, an early draft of what would eventually become the Rome Statute demonstrates that language expressly conferring ICC jurisdiction over organizations or states was intentionally omitted from the final version. This draft included language providing that "[t]he Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives."[93] Following lengthy negotiations, however, this proposed language was removed, thereby limiting the ICC's jurisdiction to natural persons.[94]

89. *Id.*

90. Rome Statute, *supra* note 53, art. 25(1).

91. *Id.* art. 21(1).

92. *Id.*

93. Draft Statute for the International Criminal Court, art. 23, U.N. Doc. A/CONF.183/2/Add.1 (1998).

94. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 150 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

Furthermore, Article 15(4)(g) of the 1991 International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind set forth a definition of "aggression" that included "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."[95] In the same spirit, Article 23 of the Draft Code included a prohibition on the "Recruitment, use, financing and training of mercenaries."[96] Yet both of these provisions were ultimately omitted from the final Rome Statute.

On a related note, a panel of international legal experts convened by the Office of the High Commissioner for Human Rights recommended in 2001 that "[a]lthough the Statute of the International Criminal Court does not refer to mercenaries, . . . further consideration should be given to the extent to which mercenarism could be considered an aggravating circumstance in the event of liability for genocide, crimes against humanity and war crimes,"[97] which might have provided a "back channel" by which jurisdiction could be conferred. Ultimately, however, the U.N. Special Rapporteur on mercenarism concluded that this connection could not be made until the legal definition of "mercenary" was changed to include private military contractors.[98] Even if these contractors were covered by the applicable definition, however, attributing liability for any war crimes they committed upward to the relevant state or corporate actors who employed them would remain very difficult. In the end, liability appears to stop at the individual, for

> [t]here are no possibilities of threats of company fines or dissolution, as no international laws specifically recognize the existence of the firms. There is also no mechanism for dealing with clients who hire the firms. . . . In fact, the only real legal sanction available applies not to the firms, but only to their employees, and only in very limited circumstances.[99]

Finally, Article 98 of the Rome Statute preserves the core principle of the many status-of-forces agreements in effect between the United States and other countries to the effect that a nation "sending" military forces deployed on foreign soil—the "sending State"—retains primary criminal jurisdiction over its forces unless it consents to local prosecution.[100] Formally, the United States negotiated the words "sending State"

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95. *Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, at 238, art. 15(4(g)), U.N. Doc. A/46/10 (1991).

96. *Id.* art. 23.

97. July 2003 Report, *supra* note 18, ¶ 57.

98. *Id.* ¶ 58.

99. Singer, *supra* note 51, at 533–34.

100. Rome Statute, *supra* note 53, art. 98. The text of Article 98 reads:

to ensure that Americans sent on official missions overseas would retain this important protection. Informally, although Article 98 was not explicitly intended to protect unofficial actions, such as those taken by mercenaries or others not acting under express governmental authority, the ambiguous status of private military corporations makes it unclear whether they would be covered.[101] Given this multiplicity of mechanisms for limiting liability, it appears unlikely that the ICC could by itself serve as an effective constraint on modern mercenarism.

3. *Implications of the Persistent Definitional Lacuna*

This persistent interpretation of mercenaries as individual agents whose deployment is only attributable to relevant state actors or persons who deal with them directly—but not intervening corporations—effectively immunizes state actors employing mercenaries through the conduit of the private security corporation from liability for any crimes they might commit, whether authorized or ratified by the state or not. Because the definition of "person" in international law encompasses only natural persons and not legal persons such as corporations, attribution up the chain of command of the actions of mercenaries working for private military corporations is impossible under the relevant provisions of international law. Without recognition of the corporate entity as a necessary conduit between the employing state and the private soldier, the law lacks any positive basis for making the connection between the actions of the individual mercenary and the state actors on whose behalf those actions were undertaken. Nor, because of the same failure to provide for a means of attributing liability upward to an entity other than a person or a state actor, is it possible to link the actions of individual mercenaries to the corporations who hire them directly. The corporation as an actor involved in mercenary activities is a legal category that simply does not ex-

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Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

101. In other words, the United States has made what appear to be repeated attempts to exempt its citizens and agents from the international legal system by ensuring the inclusion of Article 98 in the Rome Statute to limit the ICC's jurisdiction over U.S. agents and then nevertheless un-signing the Statute, as well as making side agreements with foreign nations and the U.N. Security Council to shield U.S. agents from liability for any potentially criminal behavior in which they may engage while abroad.

ist, either as a subject of liability or as a channel through which liability could flow to a state.

Furthermore, the U.S. military itself may be compromised by the outsourcing of its most critical operations to private companies. Instead of a controllable, accountable command structure, the armed forces could become a decentralized complex of private, for-profit entities responsive to nothing more binding than contractual obligations. As has been demonstrated by the abusive treatment of prisoners under the supervision of private interrogators at Abu Ghraib,[102] reliance on private corporations to perform sensitive military operations can be misguided. This is no less true in the context of combat.

Various commentators have made much of the failure of international law to recognize the new form taken by the mercenary. Essentially, these views fall into two camps: those who advocate a reassessment of existing definitions, and those who believe no adequate definition can be formulated for an industry of this complexity. Adherents to the former view are themselves divided over whether the proper control of mercenaries would involve a complete prohibition or mere regulation. Taking the latter of these viewpoints, U.S. Army Judge Advocate Todd Milliard argues that "today's international provisions aimed at mercenary regulation suffer from myopic analyses because, in law and fact, they are still directed at controlling post-colonial mercenary activities in Africa."[103] As a result, "existing international law provisions were designed to regulate only one type of mercenary, the unaffiliated individual that acted counter to the interests of post-colonial African states."[104] This outlook suggests that the gap in the laws can—and should—be rectified by a simple definitional change, such as that proposed by the U.N. Special Rapporteur Ballesteros, which "is not limited to the mercenary as an individual agent but includes mercenarism as a concept related to the responsibility of the State and other organizations and individuals."[105] Ballesteros would take Milliard's view a step further, advocating the eradication rather than mere regulation of today's modern mercenaries.[106]

Prominent among those in the other camp is Peter Singer, who expresses a more doubtful point of view. Noting that "no international laws specifically recognize the existence of [private military corporations]," he opines that,

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102. Hersch, *supra* note 43.
103. Milliard, *supra* note 14, at 5.
104. *Id.* at 5.
105. July 2003 Report, *supra* note 18, at 2.
106. December 2003 Report, *supra* note 13, ¶ 64.

> [p]articularly with regard to [private military corporations], what little law exists has been rendered outdated by the new ways in which these companies operate. In short, international law, as it stands now, is too primitive in this area to handle such a complex issue that has emerged just in the last decade.[107]

In contrast to Milliard and Ballesteros, Singer concludes

> that defining mercenaries is extremely difficult, if not outright impossible, and certainly of no assistance in dealing with the [private military] industry. Moreover, existing international law neither regulates nor forbids the activities of mercenaries, but rather proposes a definition and specifies their legal status only under certain conditions.[108]

Singer appears to embrace the view that international law is an inadequate vehicle for the control of private military corporations, even in the mild form of regulation. In disregard of the Convention Against Mercenaries, which he discounts elsewhere because of its dearth of signatories,[109] he implies that existing international law is too insignificant to matter, reinforcing his conclusion quoted above that international law "is too primitive in this area to handle such a complex issue."[110] This attitude is increasingly prevalent; however, this Note will argue that it is based on a misinterpretation of the binding nature of the spirit reflected not only in positive but also in customary international law.

IV. The Obligatory Nature of International Law

A. The Employment of Mercenaries Is Part of a Pattern of Disregarding International Law

Updating the definition of "mercenary" in the Convention Against Mercenaries to encompass corporate mercenaries and similarly amending the Rome Statute would lay the groundwork for the upward imputation of liability for war crimes committed by private contractors. Were these changes to be made, they would presumably provide additional protection to both states that have ratified the Convention and states party to the ICC. Yet this would not fully address the problem posed by the United States, the largest employer of private military contractors in the world, which has not ratified the Convention and would be even less likely to do so were these changed implemented. The use of private military corporations by the United States is only one among a number of examples manifesting a more general mindset prevalent in recent American foreign policy regarding international law as not binding unless

107. Singer, *supra* note 51, at 525–26 (footnote omitted).
108. *Id.* at 533 (footnote omitted).
109. *Id.* at 531.
110. *Id.* at 525–26 (footnote omitted).

backed by enforceable sanctions. In the context of international regulation of mercenarism, the belief appears to be that the divergence of the letter of the law from its spirit resulting from the definitional uncertainty renders international efforts to eliminate mercenarism irrelevant. This view is in contrast with a more traditional perspective from which international laws and conventions are seen as representing the aspiration of the community of nations that its member states conduct their affairs in accordance with rules intended for the mutual benefit of each state. To be bound by the rules of international law would therefore seem to be a necessary consequence of existence as a state, as each state is by definition a member of the international community.

Notwithstanding the coherence of this latter view, certain states routinely deny that they are bound by international law and conduct themselves as though they are beyond its reach. Recent analyses of international law put forward by lawyers for the United States government, contained in classified memoranda to executive department officials,[111] provide a contemporary example of a state attempting to argue that it can circumvent not just international custom but positive international conventions to which it has agreed to be bound, on the assumption that such laws create no obligations of compliance. These memoranda, taken together with the United States' extensive employment of private military contractors and the potentially coerced side agreements precluding legal action against agents of the United States, seem to comprise a concerted effort by the United States to extricate itself from its obligations under international law. Thus, the use of modern mercenaries in contravention of the manifest spirit of international law appears to be only one part of an overall pattern of evading international law.

Such governmental policy decisions have been supported by a variety of academic arguments suggesting that the United States need give no credence to international law because, for example, its rules are not followed and it possesses no meaningful sanctions with which to force states into compliance.[112] These foundational attacks on the validity of international law raise a number of threshold questions prefatory to the ultimate question whether international law creates obligations: Is international law really law? If so, is its validity eviscerated by noncom-

111. *See, e.g.*, Draft Memorandum from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002); Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002); *see also* Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 7, 2004, at A1.

112. *See* Part IV(B)(2), *infra*.

pliance or the absence of sanctions? How could international law create a binding legal obligation? Would this obligation be legal or moral? These questions will be addressed below in an effort to tackle the ultimate question of whether any state can legitimately escape the dictates of international law. This Note argues that some form of international law, either positive or customary, is by definition binding on all states. Of course, at present the international community appears unable to prevent the United States from doing what it pleases. Should that circumstance, however, suffice to call into question the legitimacy of the international legal system?

B. The Spirit of International Law Should Be Binding Even If the Letter of the Law Diverges

1. *Is International Law Really Law?*

In order to address the question whether international law creates obligations, it is first necessary to determine whether international law is really law. The positivist critique laid out by H.L.A. Hart in *The Concept of Law*[113] suggests a useful framework for formulating an answer. The weight of this question is compounded by the frequently expressed concern that international law lacks sovereign force and cannot be binding, and that only a system of "might makes right" among sovereign states exists at the international level. Hart bifurcated the question of the validity of international law into separate but interdependent inquiries: whether states are fundamentally capable of being the subjects of legal obligation and whether international law can bind them.[114] This Note will assume an affirmative answer to the first question and will focus on the latter question, which Hart himself suggested was intimately related to the question whether international laws, given their ambiguous character, can give rise to obligations.[115]

International law, broadly construed, is the body of rules that can be derived from observation of the interaction of state actors on the international stage. Although Hart was skeptical as to whether states can be "actors" for purposes of law, he would admit that states can clearly consent to treaties on signature and ratification.[116] States tacitly consent to be bound by customary international law through their participation in development of customary law and norms, from which what Hart calls primary rules, the first component of a legal system, are derived. If we accede to the idea of an international society of states, we see that states

113. H.L.A. Hart, The Concept of Law 213–37 (2d ed. 1994).
114. *Id.* at 216.
115. *Id.*
116. *Id.* at 220–32.

consent to be bound by the general system of customary international law, or primary rules, by participation in world affairs. Thus, it would appear that sovereign states are capable of being the subjects of legal obligation, once we acknowledge that states can be "actors" for purposes of law. For the primary rules of international law to exist therefore requires only this minimal behavior by states, which itself gives rise to a norm of international law.

2. *Is International Law Eviscerated by Failures of Compliance?*

Nevertheless, a prevailing academic and policy view is that the international legal system has broken down, a representative statement of which is offered by Michael Glennon.[117] Glennon contends that, because its rules have repeatedly failed to prevent the illegal use of force by one state against another, the Charter of the United Nations is no longer valid and can be disregarded.[118] The Charter's lack of credible threats of enforcement therefore renders the United Nations impotent, because it cannot prevent member states from breaking the law, thus rendering the international legal system illegitimate.

Glennon cites as examples Article 2 of the U.N. Charter, which sets forth general prohibitions against the use of force by member states,[119] as well as Article 51, which provides for an "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[120] These laws have not stopped member states from attacking and invading other states without having first been attacked themselves. Glennon points out that these provisions have been violated with impunity well over one hundred times since the Charter's ratification in 1945.[121] Moreover, in the absence of effective sanctions, states continue to ignore U.N. restraints on the use of force and initiate wars of aggression more often than they act in self-defense. As a result of its continual violation, Glennon argues, the Charter cannot be considered valid law. As Glennon puts it,

> [t]he international legal system is voluntary and states are bound only by rules to which they consent. A treaty can lose its binding effect if a sufficient number of parties engage in conduct that is at odds with the constraints of the treaty. The consent of United Nations member states to the general prohibition against the use of force, as expressed in the

117. Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFFAIRS, May–June 2003, at 16; Michael J. Glennon, *How War Left the Law Behind*, N.Y. TIMES, Nov. 21, 2002, at A37.

118. Glennon, *How War Left the Law Behind*, *supra* note 117.

119. U.N. CHARTER art. 2.

120. U.N. CHARTER art. 51.

121. Glennon, *How War Left the Law Behind*, *supra* note 117.

> Charter, has in this way been supplanted by a changed intent as expressed in deeds.[122]

Glennon's final point, that the Charter has been superseded by a changed intent of the member states as expressed in their actions, is unsound. Disregard for the law does not necessarily vitiate it. The Eighteenth Amendment to the United States Constitution, for example, was not invalidated by the changed intent of consumers as expressed by their consumption of alcohol during Prohibition.[123] Even when the states themselves embraced the intent to rescind Prohibition and acted in accordance therewith by neglecting to enforce it, this intent did not serve to nullify the Amendment until the appropriate number of states ratified its repeal. Similarly, in other legal contexts, deeds alone are insufficient to defeat legally binding commitments. Failure to comply with the Convention Against Mercenaries, therefore, would not serve to vitiate its prohibition.

3. *Does International Law Depend on Enforceable Sanctions?*

Another common misperception regarding international law is the equation of the binding character of law with the imposition of sanctions for its violation. This equation of being bound with the likelihood of suffering sanctions echoes John Austin's "command" positivism, according to which law consists merely of commands backed by threats.[124] The corresponding belief that law is dependent on the threat of force is widely held. Hans Kelsen, for example, arrives at this conclusion from a starting point analogous to Glennon's view discussed above. Kelsen conceives of international law as a primitive legal order characterized by the technique of self-help in the absence of an objective authority competent to decide conflicts among states. He regards the content of international law as norms arising out of custom that "create obligations or rights for all states."[125] Yet Kelsen, like Austin, adheres to the view that "so-called international law is 'law,' if it is a coercive order, that is to say, a set of norms regulating human behavior by attaching certain coercive acts (sanctions) as consequences" for violations.[126]

In *The Concept of Law*, however, Hart famously demonstrated the inadequacy of Austin's theory and its progeny.[127] According to Hart, to

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122. *Id.*

123. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. Of course, this analogy turns on only one provision of an agreement, not an agreement in its entirety; but this narrowed scope does not weaken the analogy, given the numerous ways in which parties bound to an agreement can violate it from time to time without causing its nullification.

124. HART, *supra* note 113, at 217.

125. HANS KELSEN, PURE THEORY OF LAW 323 (Max Knight trans., 1989) (2d ed. 1960).

126. *Id.* at 320. He identifies the potential sanctions as reprisals and war.

127. HART, *supra* note 113, at 79–99.

understand how law creates obligations legal philosophers must take both an "internal" and an "external" perspective on the law, whereas Austin takes only the latter.[128] The "external" point of view looks only at what subjects are likely to do in response to the rules that govern them. This view, although necessary to understanding behavior, imagines rules as little more than commands. By contrast, the "internal" point of view Hart calls for considers why people respond to rules in the way they do—i.e. the norms that govern them—from the perspective of the participants in the system.[129] As Hart argued, Austin's account of positivism is impoverished, in part because he failed to address the critical importance of *rules* in conceptualizing a legal system. Rules differ meaningfully from commands: Commands can *oblige*, or "force," an actor to do something, but only rules can *obligate*, or "create a duty" for, an actor to do something.[130] Failure to fulfill a duty does not render it invalid. By ignoring the notion of obligation, Austin thereby ignored the normative component of law. Without a normative component, one is left not with a legal system but a system of authoritarian force. By contrast, according to Hart, "once we free ourselves from the . . . conception of law as essentially an order backed by threats, there seems no good reason for limiting the normative idea of obligation to rules supported by organized sanctions."[131]

Hart does, however, raise one weakness in the argument that laws can be binding in the absence of sanctions. As Hart points out, the necessity of sanctions can also be defined as their function "as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system."[132] In addressing a similar question, Elihu Root offers a perspective on this issue that suggests a way in which such voluntary co-operation could come about in a system that is in fact very low on coercive force, such as the international legal regime. Noting that the "apparent absence of sanction for the enforcement of the rules of international law has led great authority to deny that those rules are entitled to be called law at all," Root counters that there are in fact "sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law."[133] He asserts that it is a

128. *Id.* at 82–91.
129. *Id.*
130. *Id.*
131. *Id.* at 218.
132. *Id.* at 198.
133. Elihu Root, *The Sanction of International Law*, 2 AM. J. INT'L L. 451, 451–52 (1908).

mistake to assume that sanctions are the chief mechanism for securing obedience to law, either municipal or international.[134] In most cases, individuals refrain from unpermitted conduct primarily our of fear of incurring "the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members," rather than out of fear of the official legal sanction.[135]

This balance of motivations, Root suggests, also induces states to comply with international law or convention even in the absence of official legal sanctions.[136] Root posits that, historically, the transformation of isolated nations into a community of nations subject to the potential condemnation of worldwide public opinion for failure to conform to the emerging standards of conduct resulted in a widespread willingness to comply with international law. This compliance has been based both on the fear of isolation threatened by condemnation and "partly upon the knowledge that in the give and take of international affairs it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it."[137] In either case, the influence of international law has not been dependent on enforcement by explicit punitive sanctions.

The two questions posed in this section and the last—whether international law can survive the absence of sanctions or compliance—are both related to a more fundamental issue: the marked inequality among states participating in the international community. The very possibility of the existence of international law rests on the artificial premise of equality among sovereign states before the law. Hart therefore points out that the "vast disparities in strength and vulnerability . . . between the units of international law is one of the things that has imparted to it a character so different from municipal law and limited the extent to which it is capable of operating as an organized coercive system."[138] This factual inequality directly calls into question the "system of mutual forbearance and compromise which is the base of both legal and moral obligation" in municipal law.[139]

Nevertheless, even in the absence of literal equality of power among states, formal equality before the law seems to be a necessary component of an international legal system. As Cecil Hurst, Legal Adviser to the British Delegation in the League of Nations and one of the founders of

134. *Id.* at 452.
135. *Id.*
136. *Id.* at 456.
137. *Id.* at 455.
138. HART, *supra* note 113, at 195.
139. *Id.*

the World Court, notes, "[i]t is only in respect of [the] right to manage their own affairs that States are equal—a principle that may be adequately summarized as equality before the law."[140] According to Hurst, this constitutive condition means that no state can exempt itself from requirements imposed on other states. He argues that, by its very nature, international law therefore remains binding even in the absence of sanctions: "[T]o be subject to and to be bound by the rules of international law is the necessary consequence of existence as a State."[141] Hurst reasons that, because they stand equal before the law, no state can "put forward a claim as a claim of right on behalf of itself or of its citizens which in the converse circumstances it would refuse to admit could be put forward against itself."[142] As a result, equality before the law should obligate each state to admit that "it cannot claim from other States a rule of behaviour to which it would not itself conform."[143] Because the community of nations consists of all states, this circumstance "implies that there must be rules of general application upon which the practice of States should be founded," without regard to whether those rules are either enforceable by means of sanctions or even adhered to in fact.[144]

In conclusion, it appears that Glennon and others who argue that international law is more imaginary than real because of a failure of compliance and a paucity of sanctions are mistaken. International law does exist and is appropriately regarded as law. Answering these threshold questions nevertheless leaves unanswered the central question of how such law can give rise to an obligation of compliance.

C. Does International Law Create Legal Obligation?

Legal philosophers have long puzzled over the question identified by Hart as the central question with respect to international law: "Can such rules as these be meaningfully and truthfully said ever to give rise to obligations?"[145] Hart himself answered this question affirmatively; however, Joseph Raz has brought to light serious complications with the concept of legal obligation that call into question whether international law really can be legally obligatory. In turn, other legal theorists have addressed Raz's reservations. Tony Honoré argues that international law creates legal obligations as a result of a basic norm of a duty to cooperate in a common international enterprise demanding accommodation among

140. Cecil J.B. Hurst, *The Nature of International Law and the Reason Why It Is Binding on States*, 30 Trans. of Grotius Soc'y 119, 121 (1944).

141. *Id.* at 127.

142. *Id.* at 123.

143. *Id.*

144. *Id.*

145. Hart, *supra* note 113, at 217.

states. John Finnis draws on an analogous norm concerning resolution of cooperation problems in the international community to show that customary international law can also give rise to obligations. Although the particular disputes taken up by these theorists may never be fully resolved, it appears on balance that there is significant support for the contention that international law can and does create legal obligations.

1. *Hart's Criteria for Creating Legal Obligation*

International law appears to satisfy the criteria Hart specifies as necessary for rules to give rise legal obligation. Hart identifies as the primary criterion governing whether a rule can impose an obligation the circumstance that "the general demand for conformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great."[146] The social pressure need not involve legal or physical sanctions and may in fact be nothing more than verbal disapproval or appeals to the violator's respect for the rule violated. In addition to this primary criterion, Hart identifies two other characteristics of obligation. First, the rules to whose violation this social pressure attaches must be "thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it."[147] Second, in addition to benefiting others, the conduct such rules require is generally in conflict with the interests of the person on whom they impose the obligation of compliance.[148]

International law satisfies all three of these criteria: It is widely accepted that states violating recognized international laws and conventions are subjected to verbal and/or moral formal disapproval by other members of the international community, and the demand for conformity to these rules is consistently applied with few exceptions. In addition, it is widely recognized that the purpose of international law is to facilitate the very survival of an international community, meaning that pressure to obey the rules of international law is applied because adherence to those rules is thought essential to the maintenance of that community. Finally, the essential requirements imposed by many international laws are that states conduct themselves in a way that benefits the international community while imposing limits on their abilities to pursue their individual interests. In fact, Hart himself acknowledges the validity of a similar argument:

> It is clear that in the practice of states certain rules are regularly respected, even at the cost of certain sacrifices; claims are formulated by

146. *Id.* at 86.
147. *Id.* at 87.
148. *Id.*

> reference to them; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. These, surely, are all the elements required to support the statement that there exist among states rules imposing obligations upon them.[149]

2. *Raz's Objection to the Notion of a Legal Obligation*

Although international law therefore appears to meet the formal definition of rules that can create legal obligations, Joseph Raz offers an argument suggesting both that it is perhaps too hasty to conclude that international law does in fact create such obligations, and that what we mean when we speak of a legal obligation may be more accurately termed a moral or prudential obligation. Raz distinguishes an obligation to obey the law from an independent reason to do that which the law requires, noting that "[t]he obligation to obey the law implies that the reason to do that which is required by law is the very fact that it is so required."[150] Therefore, an obligation to obey the law "is a general obligation applying to all the law's subjects and to all the laws on all the occasions to which they apply."[151] In other words, such an obligation would need to rest on the desirability of always doing as the law requires, and could not be based on the fact that adherence to the law would facilitate certain goals.

From this perspective, a true obligation would preclude an argument that empirical reasons could justify exceptions to that obligation. An argument, for example, that disobedience was warranted under certain circumstances in which it would produce a desirable outcome would be incomprehensible: Not only would the ground supporting the exception (a desirable empirical outcome) be incommensurable with the underlying reason for the obligation (a categorical principle), but the argument that it was desirable to violate the law under certain circumstances would straightforwardly contradict the premise on which the obligation depended—that what was desirable was always doing as the law required. Raz suggests that the only allowable exceptions to such an obligation are those explicitly recognized by the law itself, which "assumes the right to determine in what conditions legal requirements are defeated by other considerations," such as self-defense or necessity.[152]

Raz's argument is difficult to counter, because he highlights the primary reason why it seems desirable that international law should create obligations—which is that the outcomes will generally be better if states that find it in their interest to violate international laws or conventions

149. *Id.* at 231.

150. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 234 (1979).

151. *Id.*

152. *Id.* at 236.

are precluded from doing so by an obligation to follow those laws—and argues persuasively that this type of reason does not form the foundation for a legal obligation to obey the law. Notwithstanding this definitional complication, however, the fact remains that there appears to be a basis in the very existence of international law for creation of some sort of binding obligation.

3. *The Basic Norm of International Law as Interpreted by Honoré*

Tony Honoré examines the foundations of law itself, and of international law in particular, in an effort to determine what this basis is for deriving legal obligation from international laws.[153] Addressing the rudiments of law, Honoré observes that laws arise as a means of coordinating the conduct of members of groups. In order to sustain coordination, groups develop conventions, which themselves acquire normative force. For those conventions to evolve into laws, techniques of reinforcement are also developed. Honoré distinguishes three types of norms: substantive norms, which are the conventions themselves; remedial norms, which "prescribe what is to happen when substantive norms are violated"; and source norms, which function essentially as rules of recognition[154]—the essential secondary rules that specify the conditions of validity for other secondary rules. According to Honoré, "[n]orms which are interrelated and supported in these ways count as laws."[155] The normativity of this type of rule is social normativity, which Honoré distinguishes from the "genuine, objective normativity" that constitutes legal obligation.[156] Honoré defines such obligation as follows: "Law purports to prescribe obligations which bind citizens irrespective of the penalties for disobedience. The penalties are imposed on the assumption that the obligations, breach of which leads to their imposition, are independently binding."[157] On this definition, laws create obligations regardless of sanctions. Honoré elaborates that laws bind the members of a society

> *provided they have a duty to co-operate with one another in pursuing the common enterprise on which the group is engaged.* Since the members of the group to whom the laws apply are ordinarily the same as those who have a duty to co-operate, laws create obligations in so far as they prescribe appropriate modes of co-operation.[158]

153. TONY HONORÉ, MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL (1987).

154. *Id.* at 4. Hart describes his rule of recognition as "specifying 'sources' of law and providing general criteria for the identification of its rules." HART, *supra* note 113, at 214.

155. HONORÉ, *supra* note 153, at 4.

156. *Id.*

157. *Id.*

158. *Id.* at 5 (footnote omitted).

He arrives at this definition—that laws impose obligations on all members to whom they apply by prescribing appropriate rules of cooperation—by positing that the duty to cooperate is in fact the basic norm of a society.

Honoré's starting point in articulating the basic norm is Hans Kelsen's view that a legal system requires a basic norm in order to render consistent the demands made on members of a society. By means of adherence to a basic norm that is neutral among competing moral and political viewpoints, laws are able to create obligations. Honoré argues, however, that, "contrary to Kelsen's view, the norm which guarantees consistency must be a substantive norm."[159] The basic norm that he proposes is therefore "that the members of a society have a duty to cooperate with one another," from which it follows that members of a society have a duty to foster cooperation through compliance with "restrictions on their freedom imposed in the interests of others by social convention or by institutions."[160] According to Honoré, this proposed basic norm serves as justification for "all forms of obligation, legal, moral, social, and political."[161]

With respect to international law, Honoré departs even further from Kelsen's reasoning. Kelsen posits that norms prescribing what ought to or ought not happen confer legal meaning on actions, rendering them legal or illegal by turning the ought into an objective meaning.[162] Kelsen's basic norm consists in "a presupposition, establishing the objective validity of the norms of a moral or legal order,"[163] similar to Hart's rule of recognition.[164] Kelsen elaborates that this basic norm "must be a norm that established custom—the reciprocal behaviour of the states—as a law-creating material fact."[165] According to Honoré, however, Kelsen's basic norm of international law—the principle that agreements must be kept or that customary behavior should be maintained—could not give rise to an obligation to obey because there is no duty to make agreements or to respect detrimental customs.[166] Honoré suggests, therefore, that "[i]f modern international law is binding on states it can only be by virtue of the more far-reaching principle that *states have a duty to co-operate, when*

159. *Id.* at 6.

160. *Id.*

161. *Id.*

162. *Id.* at 4–7.

163. *Id.* at 8.

164. HART, *supra* note 113, at 214.

165. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 108 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) (1934)

166. *See* HONORÉ, *supra* note 153, at 14–15 (discussing HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369–70 (A. Wedberg trans., 1949)).

their interests conflict, with a view to arriving at an accommodation."[167] The basic norm on which this obligation rests is the duty of cooperation in the common enterprise, which itself requires the accommodation of the interests of various states.

Given this inter-state basic norm, much of Honoré's reasoning regarding laws imposed by states on their citizens is applicable in the international context as well. As he points out, "international law is a sort of state law: not the law of the group of which the state is composed but the law of the group which states themselves compose."[168] In other words, the reasons obligating individuals to comply with state-created laws can be analogized to the reasons obligating states to comply with international laws and conventions. Because of the strong dependence among states and the dearth of alternatives to participation in the global international community, there should be an even greater incentive for states to comply with international law and convention. Whereas an individual citizen can often switch membership to a more favorable state, a state isolated from the international community would be without any alternative. Even in cases in which the international community lacks a concentrated reserve of force, "[t]he capacity of the international society to refuse recognition to or ostracize delinquent states corresponds in the case of that society to the capacity of the sovereign state to deploy its predominant reserve of physical force."[169]

Honoré's argument also lends support to the view defended above, that the obligatory nature of international law is independent of its power to impose sanctions. As in the case of state laws, which appear to create an obligation to obey independent of the actual imposition of sanctions backed by force, the obligations imposed by international laws are not dependent on the actual exercise of the power to ostracize but are simply generally effective "because the international society has at its disposal in the last resort a drastic threat."[170] The obligation component—on Honoré's theory—arises both from the fact of participation in the joint venture of cooperative coexistence, and from the efficacy of the law or convention in question at promotion of the common interest through furtherance of this cooperation. Force, whether through the means of an ambiguous threat or as a backing to explicit sanctions, plays a role only in the last of these components: the actual effectiveness of the law in leading citizens or states to honor the obligations it independently creates. If we agree with Raz that this type of consideration is out of

167. *Id.* at 15.
168. *Id.*
169. *Id.* at 13.
170. *Id.* at 13–14.

bounds with respect to obligation to obey the law, yet still assert that legal obligation is possible on the basis of participation in a joint venture, then an absence of sanctions or of an effective enforcement mechanism would leave unmarred the fact of a legal obligation to comply with international law.

In fact, Honoré specifies that the duty to cooperate on which the obligatory nature of law and convention depends is defined (and limited) by the purposes of the society to which the members belong.[171] In the international context, whether laws give rise to obligations is therefore dependent on the purpose of international society, which he describes as the establishment of accommodation among states in furtherance of the members' interests. In such circumstances, unless the common enterprise were abandoned or the purpose of international society rejected, the refusal to abide by the prescriptions imposed by existing international laws in furtherance of that purpose would do nothing to disprove the obligatory nature of those laws.

Finally, the absence of official sanctions does not detract from either the obligatory nature of international law and conventions or the power of threat that serves as an additional reason for compliance with those obligations. This reasoning parallels the clarification offered by Hart of Austin's view of laws as commands backed by force. International law thus conceived contains the necessary element to obligate rather than merely to oblige.[172] This obligation, because it rests on something more than a mere command, is not dissipated by the absence of sanctions actually applied with the force necessary to oblige compliance.

Honoré's interpretation of the way in which international law creates obligations therefore seems relatively conclusive in theory. The authority of a purported legal obligation is tested in practice, however, when the law generating the obligation comes into conflict with another law. The practical validity of Honoré's theory seems as if it would hold even when confronted by conflicting obligations arising out of membership in another group—yet the primary reason for this would be that the threat of force that other states could marshal against a violator of international law is the strongest conceivable motivation for acting or refraining from acting against one's own interests. As a result, actors confronted with conflicting obligations are likely "to obey the group which disposes of the greatest reserve of force. This is true even when the people whose duties conflict would, if free from threat, prefer some other group."[173]

171. *Id.* at 14.

172. HART, *supra* note 113, at 198.

173. HONORÉ, *supra* note 153, at 11.

Because of the magnitude of the threat that could conceivably be posed by an international community of states attempting to impose compliance with its norms—either officially or unofficially—the greatest conceivable force that could be brought to bear on a state faced with conflicting obligations should in theory be the force backing the international community as a whole. On this account, it would make sense to favor international law even where it conflicts with other state obligations. Although this reasoning at first appears to conflict with the idea that sanctions are not necessary to the obligatory nature of law, the force at issue here is actually independent of sanctions, although it may be a necessary condition for inflicting sanctions. In fact, what Honoré suggests is most important about the relationship among laws, sanctions, and force is that the body imposing the law—in most cases, the state—"should have at its disposal greater force than other groups, because that makes possible an effective system of sanctions," not the fact of an actual sanction triggered by the violation of each law or norm.[174]

4. *Does Customary International Law also Give Rise to Obligations?*

Even if positive international law can therefore be shown to create legal obligations, this does not answer the question whether customary law, which is the primary basis for standards and conventions governing international relations, can also give rise to such obligations. Hans Kelsen, who characterizes norms of international law as based on customs arising out of the acts of states, addresses this question directly.[175] He argues that those norms obligate states "to a certain behavior by attaching 'sanctions' (reprisals or war) to the opposite behavior; in this way international law forbids this behavior as a delict and prescribes its opposite."[176] As a result, a state whose rights have been violated by another state is "only authorized . . . to react with a sanction against infringement."[177] Thus, it would appear that on Kelsen's view, customary international law could not impose a legal obligation without the enforcement mechanism of a sanction.

John Finnis suggests that this type of thinking rests on mistaken assumptions regarding the possible source of such laws. Finnis puts forth an argument that custom can give rise to binding obligations on a basis similar to that proposed by Honoré: a framework enabling cooperation in the furtherance of the common good. This argument addresses an array of doubts regarding the potential authoritativeness of customary interna-

174. *Id.* at 12.
175. KELSEN, *supra* note 125, at 323.
176. *Id.* at 324.
177. *Id.*

tional law, including the complications raised by both Kelsen and Glennon.

Finnis asserts that an authoritative rule can arise through custom "without the benefit of any authorized way of generating rules."[178] He identifies the basic requirements for the development of such authoritative customary law in the international sphere as the convergence among states of a deliberate practice accompanied by an appropriate attitude or intention. Finnis rejects the received view, set forth in Oppenheim's treatise on international law,[179] that the requisite attitude is a conviction that the action or practice in question is obligatory according to international law, because "this is paradoxical, for it proposes that a customary norm can come into existence (i.e. become authoritative) only by virtue of the necessarily erroneous belief that it is already in existence (i.e. authoritative)."[180] Finnis would rescue this reasoning on the basis of an empirical judgment by substituting two practical judgments:

> (a) in this domain of human affairs . . . it would be appropriate to have *some* determinate, common, and stable pattern of conduct and, correspondingly, an authoritative rule requiring that pattern of conduct; to have this is more desirable than leaving conduct in this domain to the discretion of individual states;
>
> (b) *this* particular pattern of conduct . . . is appropriate, or would be *if* generally adopted and acquiesced in, for adoption as an authoritative common rule of conduct.[181]

Characterizing these judgments as affirmations that certain conduct is desirable both in general and in particular, Finnis finds them at the root of appeals to treaties or resolutions of international bodies as sources or evidence of custom. Although desirability would ideally be assessed primarily in terms of the common good of the entire international community and only secondarily in terms of the interests of the state making a judgment, he asserts that even the common reversal of this order of importance does not present an insurmountable obstacle to the formation of custom.

Finnis emphasizes that these practical judgments "are distinct from the empirical judgement that many (or few) states in fact subscribe to them," as well as from further empirical judgments regarding the number of states converging in the specified pattern of conduct and the acquies-

178. J.M. Finnis, *Authority*, *in* AUTHORITY 174, 179–80 (Joseph Raz ed., 1990).

179. *See generally* 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

180. Finnis, *supra* note 178, at 180.

181. *Id.* at 181.

cence of other states in this conduct.[182] These three *empirical* judgments are in fact prerequisites to a separate practical judgment that renders paradoxical traditional accounts of international law such as Oppenheim's claim that custom results from a belief that a practice is obligatory, i.e. a judgment that affirms "that the empirically widespread making of the two practical judgements ((*a*) and (*b*)), and the empirical concurrence of practice and generality (not necessarily universality) of acquiescence, together warrant the claim that a custom exists as an authoritative legal norm."[183] This judgment makes an unwarranted leap, in other words, from empirical statements about state practice and opinion, to the practical claim that these conditions result in a legal norm whose requirements are justified thereby. The paradox does not lie in "the classic notion that, [in] order to amount to an authoritative custom, a course of practice must be accompanied by a particular sort of attitude," but in the idea that practice and opinion together are sufficient to create an authoritative norm.[184] Instead, this seemingly paradoxical judgment must implicitly rely on a meta-legal principle concerning the international community to lend an "action-guiding and requirement-imposing force" to the legal norm derived from the existence of the three empirical conditions.[185] The suppressed practical premise inherent in this argument is that "the emergence and recognition of customary rules . . . is a desirable or appropriate method of solving interaction or co-ordination problems in the international community."[186] Finnis asserts that the formation of custom is possible only because this principle is even more widely embraced among states than the two practical principles identified above. In other words,

> the general authoritativeness of custom depends upon the fact that custom-formation has been *adopted* in the international community as an appropriate method of rule-creation. For, given this fact, recognition of the authoritativeness of particular customs affords all states an opportunity of furthering the common good of the international community by solving interaction and co-ordination problems otherwise insoluble. And this opportunity is the root of all legal authority, whether it be the authority of rulers or (as here) of rules.[187]

Finnis concludes therefore that the underlying framework of treating custom-formation as a source of authoritative norms is itself part of custom, so that "the requirements, pre-conditions, and forms of custom-

182. *Id.* at 182.
183. *Id.*
184. *Id.* at 183.
185. *Id.* at 182.
186. *Id.* at 184.
187. *Id.* at 185.

formation are themselves determined, in large part, by custom," the actual authoritativeness of which ultimately rests on "the fact that, if treated as authoritative, they enable states to solve their co-ordination problems—a fact that has normative significance because the common good requires that those co-ordination problems be solved."[188] Thus, Finnis proposes an understanding of the obligatory nature of customary law analogous to Honoré's framework based on the necessity and benefits of cooperation. In the cases of both positive and customary international law, that framework supports an obligation to act in accordance with the goals of cooperation. In other words, the basic norm of cooperation that Honoré proposes as the basic norm of a society, and thus of its legal system, is also the basic norm of international society, as Finnis points out, and therefore makes customary international law binding. The principle of cooperation, then, as the reason that underlies all law, is also the ultimate foundation for all legal obligations under international law.

D. Is the Obligation Created by International Law Legal or Moral?

The reasoning above seems to suggest that, if we accept the Honoré-Finnis framework of cooperation as the foundation for international law's obligatory nature, international law may not give rise to a pure legal obligation after all. The opportunity of furthering the common good that Finnis identifies, as well as the obligation of participation that Honoré takes to be the basic norm, in some sense draw on moral rather than legal obligations. At bottom, these obligations are based on an assessment of the moral or prudential value of the consequences of compliance with international law. Is what this Note has been arguing is a legal obligation in fact simply a moral obligation? Given the kind of considerations underlying the framework conception put forward by Honoré and Finnis, it is plausible that the characteristic obligations derived from international law and conventions are in fact primarily moral. Because these obligations are posited on the basis of the desirability of international cooperation in pursuit of the common good, it seems natural to characterize the argument that states preferring to pursue their own interests are nevertheless obligated to obey conflicting international rules—regardless of whether those rules are accompanied by sanctions—as more of a moral argument than a legal argument.

As usual, however, Hart has something to say against this view. He observes that the tendency to interpret rules governing relations among states are simply moral rules "is inspired by the old dogmatism, that any

188. *Id.*

form of social structure that is not reducible to orders backed by threats can only be a form of 'morality.'"[189] Hart objects that this viewpoint would require such a broad definition of morality that it would defeat the purpose of distinguishing moral from legal rules, and goes on to offer specific reasons why this is particularly inappropriate in the case of international law.[190] For instance, in assessing the conduct of other states, states themselves commonly refer to considerations of morality using very different terms from the arguments made against states' violations of international law.[191] Furthermore, the content of many rules of international law is morally neutral, because they are created simply in furtherance of the efficiency gained by having a clear, fixed rule governing a particular subject-matter. Finally, Hart emphasizes that the very existence of the conditions necessary for international rules to impose obligations is enough to create a foundation for international law and that it is nonsensical to suggest that an additional moral component is required.[192] Even if it would be beneficial to the system of international law for states to regard compliance as morally obligatory, there are numerous nonmoral reasons that might also motivate compliance, making it unnecessary to insist on a moral ground therefor.[193]

Regardless of the extent to which the obligations created by international law rest on a moral justification, as opposed to a purely legal justification, the arguments above clearly demonstrate that there is a binding character to international laws and conventions. Even if it remains ultimately impossible to prove such an obligation in a manner that would refute critique, the welfare of the international community depends on it being the case that this obligation is treated as real. As Honoré and Finnis suggest, the ultimate source of international law—or, for that matter, any law—springs from the need for sustained coordination and cooperation in pursuit of the general interest and demands mutual accommodation, particularly where this conflicts with individual interests. In order to maintain any international system at all, therefore, states must regard themselves as bound to comply with international laws and conventions. Even taking into account the likelihood that specific demands of compliance will at times conflict with the interests of a particular state, the overall benefits of participation in an international community are undeniably significant enough to outweigh any individual interest. The alternative—ostracism from the international community—is so bleak a

189. HART, *supra* note 113, at 227.
190. *Id.*
191. *Id.* at 228–29.
192. *Id.* at 231.
193. *Id.* at 231–32.

prospect in today's highly globalized climate that it ought to serve as sanction enough to motivate compliance with international law, regardless of the existence and enforceability of more formal sanctions. Thus, there is ample ground supporting the conclusion that the spirit of international law compels adherence to its commitment against mercenarism regardless of the inadvertent and presumably temporary departure of the letter of the law therefrom.

CONCLUSION

As noted by U.N. Special Rapporteur Ballesteros, mercenarism "affects the self-determination of peoples and serves foreign interests that pose a threat to life and to the natural resources, political stability and territorial integrity of the affected countries and . . . is linked to violations of human rights."[194] In its modern form, mercenarism is concealed by a corporate veil. Revealing what is concealed is the necessary first step toward imposing meaningful constraints on the increasingly widespread resort to mercenarism. In theory, under existing international law it should be possible to hold state actors who hire mercenaries accountable for any serious crimes they commit. In practice, however, certain states, primarily the United States, have thus far proven able to escape the dictates of international law. Nonetheless, as the images to have emerged from an Iraqi prison remind us, a great deal is at stake in resolving this dilemma.

The importance of adopting a realistic international definition of modern mercenarism is therefore outweighed by the more difficult task of making international law bind. In order to effectuate the intent of the international community to discourage the use of mercenaries, efforts should be made to impute criminal liability for their crimes not only to the corporations that employ them but to the relevant state actors who hire them. Holding state actors accountable could serve as a serious deterrent to modern mercenarism.

Such a state of affairs is theoretically attainable, because contemporary international law satisfies the requirements of a legal system capable of creating legal obligations. States that disregard the clear spirit of the existing body of law and convention are therefore violating real obligations. In former times, such rogue states were often brought into line with international standards by the exertion of community pressure. Today, however, a primary violator of international law is also arguably the world's most powerful state. The unprecedented combination of the ability and the motivation to act with impunity in the international sphere carries with it a threat to the very foundations of the international legal

194. July 2003 Report, *supra* note 18, ¶ 74(a).

order. Ironically, the self-interest whose pursuit is deemed sufficient to justify this disregard for international laws is itself ultimately jeopardized by their violation. As future Nobel peace laureate Elihu Root admonished in 1908:

> There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct. The deference shown to this international public opinion is in due proportion to a nation's greatness and advance in civilization. The nearest approach to defiance will be found among the most isolated and least civilized of countries, whose ignorance of the world prevents the effect of the world's opinion; and in every such country internal disorder, oppression, poverty, and wretchedness mark the penalties which warn mankind that the laws established by civilization for the guidance of national conduct can not be ignored with impunity.[195]

It is time that the force of such opinion should once again prevail in the determination of both how mercenarism should be defined and the extent to which it should be constrained.

195. Root, *supra* note 133, at 455.